(Caption omitted)

(Appearances omitted)

LEAHY, Senior District Judge.

MEMBERS OF THE JURY:

This has been a long case. You have sat patiently, listened carefully, and observed both witness and counsel that have appeared before you. It is now your duty to judge, to decide whether the defendants -- any or all -- have violated the Anti-Trust Acts as charged.

Before you decide for either the plaintiff or the defendants, it is my duty to charge you on the law in the case, to explain to you what the Anti-Trust Acts mean as discussed in this case and to instruct you on all legal as distinguished from factual matters that may arise in your consideration. You and I have different tasks here. I instruct you on the law in the case, the legal application of such facts as you shall determine. You decide the facts. All facts are to be determined by you alone and weighed by you alone in making your decision. Whatever counsel may say, whatever witnesses may say, whatever you may -- mistakenly or not -- think my opinion may be in the case, only you can decide what happened here; only you can determine who wins here.

If, in these instructions, any rule,

direction, or idea is stated by me in such a way as to make you think I have deliberately put emphasis on it and to infer to you how I think the case should be decided, no such emphasis is intended by me, and none should be inferred by you. For that reason, you may not single out any particular sentence or any individual point or instruction and ignore the others, but should, instead, take the instructions as whole, taking each instruction in the light of all the others.

Many witnesses have testified before you. In determining what weight and credibility to give to each one, you should consider the relation of each witness to the case, and to the parties in the case, and their interest, if any, in the case and its result. You may and should consider their temperament, feeling, or possible bias; their demeanor while testifying; their apparent intelligence or means of information concerning the things of which they testify; their situation and ability to know the matters to which they have testified; and the reasonableness or unreasonableness of their testimony. In other words, you should give such weight and credit to the testimony of each witness as under all the facts and circumstances in evidence you believe it fairly entitled to receive.[1] In this connection, if you believe that any witness has testified falsely to any material fact, you may disregard any other

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1. Aetna Life Insurance Co. v. Ward, 140 U.S. 76, 88; Quock Ting v. United States, 140 U.S. 417, 420-421.

portion or the entire testimony of that witness.

This trial has lasted a long time. There has been a large volume of evidence. The length of time it has taken to present evidence for one side or the other, or the quantity of evidence presented, does not determine the merits of the point of view presented by one side or the other. The important consideration is the quality of the evidence presented and its persuasive effect on you. Much evidence has been admitted for your consideration, sometimes over objection of counsel. I charge you now the fact that a piece of evidence has been allowed to go in does not mean that it has any intrinsic merit. That, too, is for you alone to determine. My decision that certain documents may be considered by you means only that they are not so prejudicial as to require their exclusion from your consideration. In considering any piece of evidence submitted to you, you should take into account the circumstances under which the piece of evidence came into being. When was it prepared? Who wrote it? Why was it written? Was it written in the heat of passion? Do you trust the person who wrote it? Does it prove what counsel claims it does? All these questions, and more, may properly be considered by you in the course of your deliberation. You are to consider only the evidence in the case. But, in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you

are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.[2] In other words, you should give such weight and credit to each piece of evidence submitted to you, as under all the facts and circumstances in the case, you believe it is fairly entitled to receive.

This action has been brought under Acts of Congress known as Anti-Trust Laws, which read in part as follows:

> "Every contract, combination ... or conspiracy in restraint of trade or commerce among the several states is declared to be illegal."[3]

The phrase "every combination or conspiracy" which is used in the Act is a very broad one, but the courts in construing it have narrowed it somewhat by construing the Act to apply only to unreasonable restraints of trade, so that, in effect, this section of the Act reads as follows:

> "Every contract, combination or conspiracy which is unreasonably in restraint of trade or commerce among the several states is declared to be illegal."[4]

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2. Olson v. United States, 1934, 292 U.S. 246, 247, 54 S.Ct. 704, 78 L.Ed. 1236.
3. Sherman Act, 15 USCA §1.
4. Standard Oil of New Jersey v. United States, 221 U.S. 1.

This action also has been brought under another section of the same Act of Congress, a part of which provides:

> "Every person ... [and this includes corporations][5] who shall monopolize, or attempt to monopolize ... any part of the trade or commerce among the several states ... shall be deemed guilty of a misdemeanor ..."[6]

A different section of this Act, sometimes called the Robinson-Patman Act, provides in part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality..."[6a]

However, no evidence has been presented in this case to indicate that any violation has occurred of this particular section by any party here involved.

Another section of this Act provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws

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5. Sherman Act, 15 USCA §§7, 12.
6. Ibid. §2.
6a. 15 USCA §13.

may sue therefor in any District Court of the United States ..."[7]

Under this latter section, this action has been brought. The mere fact that a suit has been started does not mean that the plaintiffs are entitled to recover damages. The burden is upon the plaintiffs to prove their case, and all the essential elements of the case, by the fair weight, by the preponderance of the credible evidence in the case, and in accordance with the law as I am giving it to you.

To "establish by a preponderance of the credible evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the credible evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.[8]

The term "preponderance of evidence" in other words, means the greater weight of credible evidence. The number of witnesses called by one party or the other is not determinative of the weight of the evidence. In your determination of the weight of the evidence, you should give consideration to the persuasive quality of the evidence and its

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7. Clayton Act, 15 USCA §15.
8. Burch v. Reading Co., 3 Cir., 240 F.2d 574, 578-579.

probative value. There is a preponderance of evidence where its persuasive quality is such that it best accords with reason and probability.

The burden of proof in this case rests upon the plaintiffs, the Dovbergs, to prove their claim against the defendants by a preponderance of the evidence, but this rule does not require demonstration, or such degree of proof as produces absolute certainty, since in human affairs absolute certainty is seldom possible.[9]

The burden is upon the plaintiffs to prove by a fair preponderance of evidence:

First: that these defendants or any of them are guilty of any violation of the anti-trust laws as charged; and second: that any such violation was the proximate cause of the business injury through which compensation is here sought.

Mere proof of a violation of an anti-trust law will not entitle the plaintiffs to recover in the absence of further proof that the violation was the proximate cause of injury to the plaintiffs' business.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if, after consideration of all the evidence in the case, you

9. Ibid.

believe that what is sought to be proved on that issue is more likely true than not true.[10]

The mere fact that the plaintiffs have seen fit to join a number of parties as defendants does not mean that all or any of them are liable to the plaintiffs, unless their liability is proved in accordance with the instructions I am giving you. Plaintiffs' claim must be judged separately as to each defendant, and the position of each defendant must be judged on its own merits. Each defendant is entitled to individual consideration of the evidence as applied to it to determine whether or not that particular defendant is liable.[11]

Throughout your consideration of this case, you should keep the first two sections of the Anti-Trust Acts that I have read to you clear and separate in your minds. The first one that I read to you went to the question of conspiracy in restraint of trade. The second one went to the attempt to monopolize any part of the trade or commerce among the states. Under the first one, the plaintiffs charge all the defendants with being a part of a conspiracy. Under the second, they accuse Pennsylvania Paste Company alone of an attempt to monopolize the wet paste manufacturing business in the Philadelphia area.

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10. Ibid.
11. 28 F.R.D. 451.

Let us consider the first one:

The Dovbergs, plaintiffs in this case, contend that these four defendants, Pennsylvania Paste Company, their competitor; Dow Chemical Company, their supplier; and Samuel Schultz and Company and Atlas Wallpaper & Paint Company, conspired together to destroy plaintiffs' business and thereby preserve Pennsylvania Paste Company's dominant position in the wet paste manufacturing business in the Philadelphia area and Dow Chemical's control of the use of the chemicals known as methyl cellulose and sodium orthophenolphenate.

What is a conspiracy? It is a combination of two or more persons or corporations by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. It is thus a form of partnership in criminal purposes, in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to violate or disregard the law.[12] A conspiracy under the Anti-Trust Acts is an understanding with respect to engaging in a course of conduct the result of which is to restrain trade.[13] One defendant alone cannot be guilty of being

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12. 28 F.R.D. 459.
13. Grim, J., Charge to Jury (Tr. 4106), Sablonsky v. Paramount Film Distributing Co., D.C.E.D.Pa., 137 F. Supp. 929.

a conspirator. A conspiracy must contain two or more persons or corporations.[14]

One need not trade with anyone with whom he does not wish to trade. One need not trade with anyone or everyone who wishes to do business with him.[15] One need not compete in a half-hearted or constrained manner. But there are limitations on one's business activity. One may not make a decision not to do business with another as a result of a conspiracy to drive the other party out of business. One may not compete against him in various ways (to be detailed throughout this charge) as a result of or after having joined a conspiracy the purpose of which is to drive the competitor out of business.[16]

The crucial question in this case is this: did two or more of the

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14. Union Pacific Coal Co. v. United States, 173 F. 737; Lowlor v. Loewe, 209 F. 721, affd. 235 U.S. 522; United States v. Reading Co., 183 F. 427, modified on other grounds, 226 U.S. 324; United States v. American Naval Stores Co., 172 F. 455. Cf. Paramount Pictures v. United Motion Picture Theatre Owners, 3 Cir., 93 F.2d 714.

15. 15 USCA §13.

16. See, Delaware Valley Marine Supply Co. v. American Tobacco Co., 3 Cir. ____ F.2d ____ (December 8, 1961 Slip Opinion, p. 5).

defendants combine, conspire or agree to do various acts, such as not selling to the plaintiff on credit, not buying from the plaintiffs, and not competing fairly with the plaintiffs for the purpose of driving the plaintiffs out of business? In other words, did Dow Chemical refuse to extend credit to the Dovbergs because of a business decision on Dow's part, be it a good or bad one, that the Dovbergs were not good credit risks; or did Dow make the decision in order to assist Pennsylvania Paste in driving the plaintiffs out of business? Did the defendant Samuel Schultz and Company and the defendant Atlas Wallpaper & Paint Company cease purchasing and selling the plaintiffs' products as a result of a business decision on their part or to assist Pennsylvania Paste Company in driving plaintiffs out of business? Did the defendant Pennsylvania Paste Company act towards the plaintiffs as it did (their actions, of course, to be determined by you) as a result of independent business judgment on its part or as a result of an agreement, combination or conspiracy,[17] or while inviting others to assist it in acting in destroying the plaintiffs' business?

You may wonder how you can possibly determine such intent. What can you look to to assist you in determining why certain acts -- if done -- were done? Express agreement is not required between conspirators. It is enough that uniformity of action is contemplated by the

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17. Ibid, p. 10.

defendants and that the defendants conformed to the arrangement. If any party understands that another wants him to pursue a particular business policy, the effect of which in view of the policies adopted by the other will be unreasonable restraint of trade, and if he adopts that policy, knowing it will result in an unreasonable restraint of trade, and it does result in such restraint of trade, then he and his associate or associates are guilty of conspiracy in violation of the Anti-Trust Laws.[18]

Neither formal agreement nor direct communication is required among conspirators. Conspiracy may be found in a course of dealing or other circumstances, as well as in an exchange of words.[19] It can be proved by circumstantial evidence, evidence which without going directly to prove the existence of an asserted fact gives rise to a logical inference that such asserted fact does in fact exist. But before a conspiracy can be said to have been proved by such circumstantial or inferential evidence alone, it is necessary not only that the

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18. United States v. Masonite Corp., 316 U.S. 265, 275; William Goldman Theaters, Inc. v. Loew's, Inc., 3 Cir., 150 F.2d 738, 743-744.

19. American Tobacco Co. v. United States, 328 U.S. 781, 809-810.

circumstances proven by the evidence shall reasonably give rise to an inference of conspiracy, but also that no other equally reasonable inference can be drawn from the same circumstances. If two equally reasonable inferences can be drawn from the circumstances proved by the evidence, one consistent with the evidence of a conspiracy and the other inconsistent, you should not infer the existence of conspiracy from such evidence alone.[20]

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but who happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a conspirator.[21]

Before the jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence must show that another has embarked on an unlawful course of action with which cooperation is invited, and that the defendant, or any other person who is claimed to have been a

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20. Steel, J., Charge to Jury (Tr. 3763) Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440, affd. 3 Cir., ___ F.2d ____ (Dec. 8, 1961). Wyeanski, J., Charge to Jury, Cape Cod Food Products v. National Cranberry Assn., D.C.Mass. 119 F.Supp. 900, 903.

21. 28 F.R.D. 460.

conspirator, knowingly and willfully participated in the accomplishment of that plan with the intent to advance or further some object or purpose of the plan.[22]

To participate knowingly and willfully means to participate voluntarily and understandingly and with specific intent to do what the law forbids, or with specific intent to fail to do what the law requires to be done; that is to say, to participate with the motive or purpose to disregard the law. So if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises, or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and willful participant -- a conspirator.[23]

One who knowingly and willfully joins another or others in carrying out an improper course of action is charged with the same responsibility as if he instigated or originated the campaign himself.[24] One may not become a member of a conspiracy unknowingly or accidentally. He can become a member only consciously and deliberately, and with knowledge either that the conspiracy which he is joining already exists or that he is taking part in its formation.

In determining whether or not a

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22. Ibid. p. 460.
23. Ibid. p. 460.
24. Ibid. p. 460.

defendant was a member of a conspiracy, you are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to his own conduct what he himself said or did.[25] But if you once find that a defendant has become a member of a conspiracy, then he is chargeable with responsibility for the actions of all parties to the conspiracy, whether committed before he became or during the time he was a member of the conspiracy.

There is no direct evidence in this case that any defendant agreed with any other defendant to attempt to put the plaintiffs out of business. No one has testified to any meeting between any two or more of the defendants at which any definite agreement to that effect was reached. Your duty will be, therefore, to examine all the circumstantial or inferential evidence in determining your answer to the basic question, whether the action of any of the defendants in this case stemmed from independent decisions or from any implied or tacit agreement with other defendants.

You should consider all the reasons parties in this suit have given for their acts. If they seem to you to be honest ones, advanced in good faith, you should take that into account in determining what happened. If they seem

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25. Ibid. p. 460.

dishonest, hastily made, advanced in bad faith, you whould take that into account.

A conspiracy may be inferred by you if on the basis of all the evidence submitted to you, you conclude that the action of the retailer defendants and/or Dow Chemical Company in allegedly refusing to deal with the plaintiffs, or in dealing with plaintiffs in the allegedly discriminatory manner alleged by plaintiffs was not a matter of sheer coincidence.[26] Evidence tending to show that there was a legitimate business reason for the act of defendant retailers and Dow Chemical in allegedly refusing to deal with plaintiffs, or in dealing with the plaintiffs in the allegedly discriminatory manner alleged, is admissible to refute the conspiracy based on circumstantial evidence; but if the all-over evidence is sufficient to support an inference that the defendants entered into a conspiracy with Pennsylvania Paste Company, the fact that a defendant's individual refusal to deal, or apparently discriminatory dealing, may be explainable as a reasonable business decision will not of itself justify his conduct or deprive it of its illegal character.[27] Should you find, however, that independent business judgment on the part of the defendants was the reason for their conduct toward plaintiffs, it does not follow that there has been a conspiracy against plaintiffs; nor may you infer

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26. William Goldman Theaters v. Loew's Inc., 3 Cir., 150 F.2d 738, 743.
27. Steel, J., Charge to Jury (Tr.3771) supra, n. 20.

from such conduct the existence of a conspiracy, merely because such conduct resulted in some harm to plaintiffs.

In determining whether or not the retailer defendants and/or Dow Chemical conspired with Pennsylvania Paste Company in refusing to deal with the plaintiffs, you may consider such evidence as was introduced which might suggest that such a conspiracy would be of financial benefit or advantage to the retailer defendants and Dow. Lack of such a financial benefit or advantage would tend to negate or refute the existence of such a conspiracy, but would not conclusively do so.[28]

You should note, though, that even if you find a pattern on the part of Dow and the retailer defendants not to deal with the Dovbergs, or to deal with the Dovbergs in a discriminatory manner, this is not enough in itself to prove a conspiracy. Proof of conspiracy must be forthcoming in addition to a general pattern being shown of refusal to deal. You must be convinced that all the elements of conspiracy I have previously described to you are present.[29]

Incidentally, in passing I made reference initially to the Robinson-Patman Act with respect to price

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28. Ibid. at p. 3771.
29. Delaware Valley Marine Supply Co. v. American Tobacco Co., CA 13,369, 3 Cir., ____ F.2d _____ (Dec. 8, 1961, Slip Opinion p. 14).

discrimination to commodities of like grade and quality. In this case, Methocel is not a like product to what has been referred to here as CAM; and, therefore, that statute has no application to issues presented to you.

You may notice that I have spent the preceding minutes speaking only of the retailer defendants and Dow Chemical. The heart of the alleged conspiracy here is Pennsylvania Paste Company. Plaintiffs charge Pennsylvania Paste Company with being the hub or focal point through which the activities of one set of defendants are related to the other, and, therefore, to each other.[29a] The defendant Dow is not alleged to have had any conspiratorial relation with the retailer defendants. Nor are the retailer defendants alleged to have conspired among themselves. The alleged conspiracies are between Dow and Pennsylvania Paste on one hand, and Pennsylvania Paste and the retailer defendants on the other. You may not, therefore, find any conspiracy of which Pennsylvania Paste is not a part. By saying this, of course, I do not imply or infer that you need find any conspiracy at all.

I wish now to suggest to you some questions you may put to yourselves in deciding whether any conspiracy

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29a. Brief on behalf of Pennsylvania Paste Company, Sur Motion for Summary Judgment, p. 9.

existed between any of the defendants. I emphasize at the start that these are merely my suggestions to you, which you are not bound by, and which you might profitably use as tools to lead you to further questions in your attempt to determine what happened here.

As to Pennsylvania Paste Company --

You may wish to ask yourselves what telephone calls did occur between Mr. Dovberg and Mr. Flanigan, and what was said in them -- whether Pennsylvania Paste actually did collect butter tubs of the plaintiffs in which plaintiffs' wet paste had been delivered -- whether Mr. Flanigan did in fact threaten retailers (some of whom you have heard testify here) that he would deprive them of their source of wet paste if they continued to do business with the plaintiffs -- whether Pennsylvania Paste did sell its Liqui-Size at a cost below which it could have made any profit -- whether Pennsylvania Paste sold Liqui-Size as a wall size eliminator whose form, composition and packaging were designed as an imitation of Nix-Size, or whether Liqui-Size was a legitimate competing product -- whether, in short, Pennsylvania Paste acted as a conspirator in an attempt to restrain trade by driving the Dovbergs out of business, or whether it merely acted as a competitor in a highly competitive field, did nothing illegal, and conspired against no one.

With respect to the retailer defendants, Samuel Schultz and Atlas Wallpaper, each of whom, I repeat, must be considered separately by you --

You may consider such questions as whether these retailers, either or both, discontinued purchases from plaintiffs knowing of Pennsylvania Paste's allegedly conspiratorial intentions, -- whether either or both sold Liqui-Size as being or being the same thing as Nix-Size -- whether, in toto, either or both conspired with Pennsylvania Paste in its alleged intent to put the Dovbergs out of business.

You should note that the mere termination of purchases of Nix-Size from the plaintiffs and the commencement of purchasing Liqui-Size under the name "Magic Coat" from Pennsylvania Paste Company by Samuel Schultz & Co. is not in itself evidence of a conspiracy unless plaintiffs also show that defendant Schultz made this change as a part of the alleged conspiracy to put plaintiffs out of business. Similarly, the action of defendant Atlas in terminating its purchases is not in itself sufficient evidence of conspiracy unless this defendant made the change as part of a conspiracy to drive plaintiffs out of business.

No direct evidence has been presented to you that defendant Schultz was at any time informed by any of the other defendants, or discussed with any

other defendant, any action against the plaintiffs designed to cause them loss or put them out of business. Your decision here, as elsewhere, must be whether the totality of the facts presented to you indicate that Schultz and/or Atlas knowingly participated, or did not knowingly participate, in the alleged conspiracy.

As to Dow Chemical Company --

You may consider whether Dow knew of the alleged intentions of Pennsylvania Paste Company, whether Dow wished the plaintiffs out of business to aid it in a wider distribution of certain of its chemicals, and whether in fact it would have -- and has -- helped Dow for the plaintiffs to be out of business -- whether Dow did unreasonably offer better credit terms to other customers, or terms of sale to other customers, than to plaintiffs and what type credit risks the plaintiffs were, and what knowledge Dow had of their credit standing -- whether Dow ever ceased selling to plaintiffs completely and/or insisted on selling them in such small amounts as to seriously harm their business. In sum, whether Dow conspired with Pennsylvania Paste to drive the Dovbergs out of business.

I repeat to you that these questions are merely guides, samples of the kind of questions presented by this case, that may assist you in making your determination as to whether there

was any conspiracy here in restraint of trade.

One part of the statute I shall decide for you. I instruct you that should you find a conspiracy in restraint of trade of the sort I have described to you, such conspiracy should be considered one among the several states. In other words, the interstate character of the business involved here need not concern you.[30]

Evidence has been introduced as to the size of the businesses involved in this case. Size of sales may be taken into account by you for such purposes as you consider appropriate. The size of all the businesses here involved may also be taken into account by you in determining reasons for their actions and the responses of others in this case to their actions.

You should note carefully, however, that the mere fact that some of the partnerships or corporations involved in this action are small should not lead you either to favor them or disfavor them because of their size. The fact that some of the other parties involved in this case are large should not lead you either to favor them or disfavor them because of that fact.[31]

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30. United States v. Yellow Cab Co., 332 U.S. 218, 225; Apex Hosiery Co. v. Leader, 310 U.S. 469, 485.
31. 28 F.R.D. 414.

On the basis of the law as I have outlined it to you, you should now be prepared to begin consideration of whether there was a conspiracy here. If you find there was none, you should vote for the defendants, and proceed to consider the second or monopoly count in this case. If you should find a conspiracy as I have described it to you between two or more of the defendants, you must then consider the question of damages. Note, however, that my instructions to you with respect to damages does not indicate and should not be construed by you as an indication that any damages need be awarded. Such instructions are being given because I am required to charge you on all possibilities and all phases of this case which it is possible for you to consider.

Recovery may be had in any Anti-Trust suit for such damages suffered by the plaintiffs to their business or property as a result of defendants' conduct in violation of the Anti-Trust Acts. Damages may only be granted for amounts lost as a result of acts or omissions of the defendants which played a substantial part in actually bringing about such loss as occurred and where the loss was either a direct result or reasonably probable consequence of such acts or omissions. In arriving at any amount of award, you should include such damages suffered by the plaintiffs as a result of lost profits; that is to say, profits which the plaintiffs would have made but for the violation of the Act by the defendants.

If you find that the plaintiffs have in fact suffered damage to their business or property, such as a loss in profits as a result of the illegal conduct of the defendants complained of, then the circumstance that the precise amount of plaintiffs' damages may be difficult to ascertain should not affect plaintiffs' recovery, if you should find as a fact that defendants' wrongdoings have caused the difficulty in determining the precise amount. On the other hand, the plaintiffs may not be awarded remote or purely speculative damages. An allowance for lost profits may be included in the damages awarded only when there is some reasonable basis in the evidence for determining that plaintiffs have in fact suffered a loss of profits, even though the amount of such loss is difficult of ascertainment.[32]

In arriving at the amount of any loss of profits sustained by plaintiffs, you may consider evidence of past earnings of the plaintiffs in the business and testimony as to projected earnings had they remained in business without the alleged conspiracy taking its toll.

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32. Bigelow v. RKO Radio Pictures, 327 U.S. 251; Richfield Oil Corporation v. Karseal Corp., 9 Cir., 271 F.2d 709; Toulmin, Anti-Trust Laws of the United States, 369 (1949); Wyzanski, Charge to Jury, supra, n.20, at p. 910; Grim, J., Charge to Jury, supra, n. 13, at p. 4122.

Plaintiffs claim that they put substantial sums into the business and that they are entitled to that money in full. They claim their plant was in every material way similar to that of Pennsylvania Paste Company, with all the equipment of Pennsylvania Paste, and more, a broader line of products, and lower labor costs. They ask that you consider Pennsylvania Paste's sales as relevant in determining what theirs would have been. They have, as well, introduced evidence of loans being made to the business by the Dovberg family. Pennsylvania Paste and the other defendants argue that even if you find a conspiracy here in restraint of trade, any compilation of damages would be merely speculative. They claim there are substantial differences in every way between their history of operations and their plants, and that no such comparisons can be fruitfully made.

Mr. Darby has testified for the Dovbergs as an expert in business evaluation. Upon visiting the place of the business and upon accepting, for the purposes of his determination of value, various assumptions read to him in a question by Mr. Monteverde, he stated that projected earnings for a 10-year period of the business, the potential value of the business, was between 75 and 100 thousand dollars.

As you recall, the question was rather lengthy. It first stated various contentions of the plaintiffs as to how much money they had placed in the

business, then asked Mr. Darby to assume -- as the plaintiffs maintain in this case -- that the business had been affected by sales of a "cheaper, less effective competitive wall size eliminator, in a similar package, marketed as 'the same thing as' the plaintiffs' wall size eliminator" and that the plaintiffs had been unable to secure for a similar price the same cellulose base for their cellulose paste which was available to the manufacturers of the principal competing products.

I will repeat to you now what I said to you at the time this testimony was admitted. Mr. Darby's testimony is opinion evidence of the fair market value of the business on the basis of the assumptions contained in the question. If you fail to find the assumptions are true, then the evaluation falls. If, on the other hand, you find the assumptions true, you should consider Mr. Darby's testimony on the same basis as any other testimony, taking into account both the direct examination and cross examination. One basic assumption on which Mr. Darby's opinion was based, for example, was that the plaintiffs' business would produce gross sales of $150,000 a year, a profit of $15,000 before taxes, and $10,000 after taxes. Unless you find that assumption and the others contained in the question to be true, you may disregard Mr. Darby's testimony as to damages.

The decision as to the existence of damages and their amount is yours

to make. But the time range that you may take into account in determining both the existence of a conspiracy and possible damages from it is a limited one. You have heard evidence of events which occurred from 1949 through 1957. I charge you now that all activity which occurred before September 28, 1954, may be considered by you as evidence of and background to a possible conspiracy, but may not be the basis of action upon which the plaintiffs recover. For the plaintiffs to prevail, you must find a conspiracy to have existed after September 28, 1954; and you may only grant damages for losses suffered after that date.[33]

The second charge in this case is against Pennsylvania Paste alone. The statute reads in part that "every person who shall ... attempt to monopolize any part of the trade or commerce among the several states"[35] shall be deemed in violation of the Act.

The Dovbergs' claim here is that Pennsylvania Paste Company violated that section of the law in an attempt to retain its allegedly dominant position in the wet paste business in Philadelphia and for the purpose of monopolizing the wet paste business in the Philadelphia area.

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33. Dovberg v. Dow Chemical Co. D.C.E.D. Pa., 195 F. Supp. 337, 343.

35. Sherman Act, 15 USCA §2.

Before you can adjudge whether the defendants attempted to monopolize or not under the Anti-Trust statute, you must first have some idea of what "monopolize" itself means under the statute. Monopoly power exists where there is power to exclude competition.[36] The use of such power to exclude competition would be a violation of that section of this Act that prohibits monopolization.[37] And the use of substantial -- but incomplete -- monopoly power to destroy threatened competition would be a violation of that part of the Act conserned here.[38] This latter act would be considered an "attempt to monopolize" under the statute. Such attempt to monopolize may not be proved, however, merely by showing that one competitor has in fact been eliminated, by business methods fair or foul. Proof must be submitted of a convincing nature that:

1. Defendant had a specific intent to monopolize.

2. Defendant did some act or acts in furtherance of the intent.

3. Defendant's act or acts and intent together resulted in a dangerous probability that a

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36. American Tobacco Co. v. United States, 328 U.S. 781, 811.
37. United States v. Griffith, 334 U.S. 100.
38. Lorain Journal Co. v. United States, 342 U.S. 143, 154.

monopoly would sooner or later occur.

I wish to examine each one of these three elements with you, and then return once more to the nature of monopoly itself.

By requiring specific intent to monopolize, as an element of the offense charged here, the statute requires the defendant to have acted purposefully with the aim of monopolization in mind.[39] The intent required goes beyond merely intending to act in a certain way towards another business and then acting that way.[40] What is required is the intent to force the competitor out of business for the purpose of achieving a monopoly. The usual way to determine this intent is to look at what the defendant said and at what he did and then to decide if these were done as part of normal, legitimate business conduct.[41] Words of a defendant of his intent to destroy a competitor are not, of themselves, sufficient to prove an intent to monopolize.[42] Nor are acts which

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39. Swift & Co. v. United States, 196 U.S. 374, 396.
40. United States v. Aluminum Co. of America, 2 Cir., 148 F.2d 416, 432.
41. Times-Picayune Publishing Co. v. United States, 346 U.S. 594; United States v. Columbia Steel Co. 3 Cir., 334 U.S. 495, 532-34.
42. Mackey v. Sears, Roebuck & Co., 7 Cir., 237 F.2d 869, 873.

do in fact force a competitor out of business thereby sufficient to prove the requisite intent. For the plaintiffs to prevail, you must find from all evidence submitted to you, subjective intent present on the part of the defendant to monopolize an area of the market.[43]

What "area of market" or "relevant market" is here involved? You must determine this as well, and in doing so two areas of inquiry should be considered by you. First, you should consider the size of Pennsylvania Paste Company and its percentage share of the total market in which it operates, taking into account relevant competitive products. Second, you should consider the structure of the market for such information as that will give you bearing on control over price and competitive opportunity that Pennsylvania Paste Company may have had. Pennsylvania Paste argues that there are other forms of wallpaper paste which it does not make, including both dry wheat paste and cellulose paste, which it claims constitute almost 100% of the relevant wallpaper paste market on a national basis. Plaintiffs, however, argue that the relevant area of the market for you to consider, the relevant wallpaper paste market, includes only wet paste manufacture. It is for you to determine what area of the market is

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43. Report of the President's Committee to Study the Anti-Trust Laws 61 (1955).

here involved. You should note, however, that the entire economic picture in this area, as presented to you by the evidence, must be observed in its totality to enable you to make this preliminary determination as to what part of the market you will even consider.

You will recall that the first requirement that you must be convinced of to find Pennsylvania Paste guilty of the violation here charged was a specific intent to monopolize.

The second requirement was some act itself in furtherance of the intent.[44] An overt act is required.

The third requirement (one often considered a part of the second) -- of a reasonable and dangerous probability that a monopoly will sooner or later occur -- was once phrased this way at the end of a sentence attempting to define what an "attempt to monopolize is:"

> "The phrase attempt to monopolize means the employment of methods, means, and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless

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44. See, Editorial Note, Attempt to Monopolize; Its Elements and Their Definition, 27 Geo. Washington L. Rev. 227, 233 (1958).

approach so close as to create a dangerous probability of it."[45]

In other words, for the defendant to be found a violator of this section of the Act, he must not only intend to monopolize, and act in accordance with that intent, but have the power to bring about an actual danger of monopolization.

Let us examine each one of these requirements in the context of the case before you.

First, intent. The Dovbergs point to alleged statements by Mr. Flanigan of an intent to drive them out of business; they claim Mr. Flanigan intended to do so to increase his control of the wet paste business in the Philadelphia area; they claim his business acts were clearly aimed not at winning customers, not even at weaning customers from the Dovbergs, but at the specific end of driving them out of business. They also make other contentions, to be considered by you as you like, in an attempt to prove the intent of Pennsylvania Paste. Mr. Flanigan and Pennsylvania Paste deny the allegations, deny there was any intent to do anything but to compete vigorously in a highly competitive field, deny that the Dovbergs posed any such threat to them as would even lead them to consider following such a course of action. In short, they deny

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45. American Tobacco Co. v. United States, 328 U.S. 781, 785.

any intent but to pursue normal and legitimate business activities.

Second, some overt act is required to place Pennsylvania Paste in violation of the statute. The Dovbergs allege such things as stealing their butter tubs in which they deliver their paste, using both threats and favors to convince retailers not to do business with them, of copying the Dovberg product Nix-Size. Pennsylvania Paste denies all these allegations, and claims that they never took the tubs, never threatened, never gave favors (except for small Christmas gifts), and did not copy Nix-Size, but merely went to a reputable chemist in an attempt to find a legitimate competing product. Other acts are charged, and all are denied. Here, of course, as throughout the case, you must determine what the facts are.

Third, the dangerous probability of eventual monopolization is required. Here you should consider evidence submitted as to how large and how powerful Pennsylvania Paste is in what I have called the "relevant market" for your consideration. In that respect, you should consider Mr. Flanagan's testimony that Pennsylvania Paste's sales constituted 50% of the wet paste market and 25% of the dry paste market in this area. You should consider as well the instructions given you as to what constitutes a monopoly itself. Note that 100% control of a market is unnecessary

to make it a monopoly.[46] One judge has stated that 90% control of a market was monopolistic, that it was doubtful whether 60% or 64% was, and that 33% definitely was not.[47] Such figures are not binding on you. Industries differ and the power to exclude competition may require less percentage of a market in one field than another. But you should note that the slighter the amount of business Pennsylvania Paste did in the relevant market, the less their power was and consequently the less the likelihood of any monopoly sooner or later occurring.

You should note, too, that the fact that the Dovbergs never were able to make their business a thriving one does not in itself indicate that Pennsylvania Paste did or did not attempt to monopolize the relevant market in the Philadelphia area. The Anti-Trust laws are as violated by the prevention of competition as by its destruction.[48]

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46. U.S. v. duPont de Nemours & Co., D.C.Del., 118 F.Supp. 41, 796; aff'd 351 U.S. 377; "Monopoly power can be distinguished from the normal freedom of business only in degree. Nothing except death is an absolute."
47. L.Hand, United States v. Aluminum Co. of America, 2 Cir., 148 F.2d 416, 424.
48. United States v. Griffith, 334 U.S. 100, 107; United States v. Aluminum Co. of America, supra, n. 46, at p. 428-429.

At the same time, the Acts were not designed to penalize the victor of hardy, yet legal, competition between businesses.[49]

Once again with respect to the time period that may be considered by you in determining violation of the Act and damages, I instruct that you may only look after September 28, 1954, in your determination whether any overt act occurred in the alleged attempt to monopolize and in any determination by you of damages.

As to possible damages, your considerations should be the same as I have described to you in considering the conspiracy count. How much did the plaintiffs lose because of activities of the defendants? In making this determination you should, once again, consider all evidence submitted to you, including such matters as how the plaintiffs would have done had they remained in business; how competent the plaintiffs were as businessmen; how much of a market there would have been for plaintiffs. Once again, I instruct you that damages may not be speculative or conjectural.

I offer one final admonition to you before you begin your deliberations. Jurors, like judges, sometimes have difficulty in a legal case keeping their minds solely on the facts presented to them. It is tempting, sometimes, to

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49. Ibid. at p. 416.

consider the personalities of parties involved, and even of counsel involved. I admonish you to remember that this case is to be decided solely on the facts, as you shall determine them, and solely by virtue of the law as I have instructed you on it.

Counsel in this case have made many objections -- some sustained; some overruled. Their duty is to object when evidence is offered that they consider inadmissible. You should not consider which counsel have fared best at the hands of the Court. A legal case is not a game in which counsel gains points for being sustained and loses them for being overruled. You are not scorers in a game. You are searchers for facts, for truth; and you must confine your considerations to that search.

Your verdict in this case must be unanimous. I advise you to consider first the conspiracy count and to determine if two or more of the defendants are liable in damages as charged. Second, you should then consider the monopoly charge made against Pennsylvania Paste alone and decide if it is liable in damages as charged. You should consider the two charges separately, and you must keep each defendant separate in your mind as you consider the case.

I shall request you to report to me two findings on your part:

First: Do you find against any two

or more of the defendants on the conspiracy count; if so, against which defendants, and for what damages?

Second: Do you find against Pennsylvania Paste on the monopoly count; and if so, for what damages?

I repeat to you that this has indeed been a long case. Undoubtedly some of you are tired, perhaps even a bit impatient to finish up and go home. Yet, as you well know, months of hard work has been put in the case by all parties here in preparing it and presenting it to you. It is important to all concerned. When you are in the jury room, I know that you will consider it solemnly and give it the full attention it deserves.

Swear the bailiff.

At Philadelphia,

March , 1962.

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 1085.

IKE DOVBERG and MAURICE DOVBERG, Individually and t/a PASTE COMPANY OF AMERICA,
Petitioners,

v.

PENNSYLVANIA PASTE COMPANY; and SAMUEL SCHULTZ, ADA SCHULTZ, MARVIN L. SPIRO and ISADORE KAPLAN, Individually and Trading as SAMUEL SCHULTZ & CO., a partnership,
Respondents.

BRIEF OF SAMUEL SCHULTZ, ADA SCHULTZ, MARVIN L. SPIRO AND ISADORE KAPLAN, INDIVIDUALLY AND TRADING AS SAMUEL SCHULTZ & CO., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI, AND APPENDIX.

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